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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

THAKORBHAI L. PATEL,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition For Writ Of Certiorari
To The Court Of Appeal
For The State Of California,
Fourth Appellate District, Division Two

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Where oral utterances are offered by the prosecution as the sole basis for delay or obstruction of a public officer engaged in the discharge of some official duty, can a criminal conviction for delaying or obstructing said officer be grounded upon mere general criminal intent without any showing that the accused harbored a specific intent to obstruct or delay the officer?

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Fourth Appellate District, Division Two

PETITION FOR WRIT OF CERTIORARI

Petitioner, THAKORBHAI L. PATEL, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the California Court of Appeal, Fourth Appellate District, Division Two, issued on September 11, 1990, affirming the judgment of the trial court which was pronounced on August 31, 1989. A petition for review was denied in a nonunanimous ruling filed on November 28, 1990. The remittitur was issued on December 3, 1990.

OPINIONS BELOW

The opinion of the California Court of Appeal, Fourth Appellate District, Division Two, affirming the judgment of the San Bernardino County Superior Court, appears as APPENDIX 1 attached to this petition. A copy of the California Supreme Court's order denying petitioner's petition for review is here attached as APPENDIX 2. The remittitur issued by the California Court of Appeal, Fourth Appellate District, Division Two, is appended hereto as APPENDIX 3.

JURISDICTION

The California Court of Appeal, Fourth Appellate District, Division Two, entered its judgment and opinion below in this case on September 11, 1990. On October 22, 1990 petitioner filed a timely petition for review with the California Supreme Court. On November 28, 1990 the petition for review was denied by a divided California Supreme Court. Title 28, United States Code, section 1257(3) confers jurisdiction on the Court in this case.

Where the highest state court has jurisdiction to review a decision of a lower state court, but refuses to do so, the time for petitioning for a writ of certiorari runs from the date of the higher court's refusal to review. (*American Railway Express Co. v. Levee*, 263 U.S. 19, 20-21, 68 L.Ed. 140, 143, 44 S.Ct. 11, 12 (1923). Since this petition is being filed within 90 days of the California Supreme Court's denial of review, this petition is timely brought. (Rule 13, Rules of the Supreme Court of the United States.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the United States Constitution and California Penal Code section 148 are chiefly involved, along with the Sixth Amendment to the United States Constitution. California Jury Instructions CALJIC 3.30 and 3.31 are also in issue. CALJIC 3.30 as given is reproduced as APPENDIX 4 which follows. CALJIC 3.31 as given is reproduced as APPENDIX 5 attached hereto.

STATEMENT OF THE CASE

On February 10, 1988 petitioner Thakorbhai L. Patel was arrested and subsequently charged with pandering (Cal. Pen. Code §266i) and attempted pimping (Cal. Pen. Code §§664/266h). After a preliminary hearing was conducted in the San Bernardino County Municipal Court, petitioner was held to answer, and the matter advanced to the San Bernardino County Superior Court as Case No. SCR-47384, after which motions were heard.

On April 20, 1988 petitioner Thakorbhai L. Patel was arrested and subsequently charged with pimping (Cal. Pen. Code §266h), maintaining a disorderly house (Cal. Pen. Code §316), and resisting, delaying, or obstructing a public officer (Cal. Pen. Code §148). Petitioner was held to answer after preliminary hearing on this case, and the matter proceeded beyond motions in the San Bernardino County Superior Court as Case No. SCR-48604.

An amended information was subsequently filed incorporating all of the above charges (Clerk's Transcript[1]: pp. 207-209), after the San Bernardino County

[1] Hereinafter abbreviated "C.T."

Superior Court ordered both cases consolidated for trial as Case No. SCR-47384 (see Reporter's Transcript[2] I: p. 8, L. 12-21).

Petitioner was tried for all of the above alleged offenses on May 16, 17, and 18, 1989, and he was found guilty of all five counts by a jury. (C.T.: pp. 205, 206, 210-219.) He was sentenced on August 31, 1989. (C.T.: pp. 304-305.) On September 22, 1989 petitioner's motion to post bond in lieu of serving jail time pending a final result on appeal was granted by the San Bernardino County Superior Court (C.T.: p. 309), following petitioner's timely filing of a notice of appeal on September 20, 1989 of the judgment of convictions against him in the two consolidated cases.

The judgment appealed from, appealable per California Penal Code section 1237(a), was affirmed by the court of appeal on September 11, 1990. After petitioner timely sought review of that decision by the California Supreme Court on October 22, 1990, his petition for review was denied on November 28, 1990, with two justices stating that they were of the opinion that the petition should have been granted. (See APPENDIX 2 attached.) This petition for certiorari timely follows the final action of California's state court of last resort. The remittitur was issued on December 3, 1990. (See APPENDIX 3 attached.)

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[2] Hereinafter abbreviated "R.T."

STATEMENT OF FACTS

Petitioner was the owner of the Palms Motel, which had been frequented by Emma Henderson for years. (R.T. I: p. 134, L. 19 – p. 137, L. 2.) Sometimes she rented a room by the hour there. (R.T. I: p. 137, L. 26 – p. 138, L. 12.) At times she went to the Palms Motel just to engage in prostitution. (R.T. I: p. 139, L. 9-19.) She had rented a room from petitioner on previous occasions. (R.T. I: p. 142, L. 14-18.) She was not told that she could have a particular room, and either put money on the counter or dropped it on the floor, but did not think she gave it to petitioner personally. (R.T. I: p. 144, L. 25 – p. 145, L. 4.) She may have gone to the motel more than once a week on unnamed and unnumbered occasions. (R.T. I: p. 145, L. 15-17.) Sometimes she went to the Palms Motel for other than work purposes. (R.T. I: p. 147, L. 9-12.) She never told petitioner what intent she had for room use when she asked for one, and often used one just to sleep or shower. (R.T. I: p. 148, L. 8-20.) She had heard that prostitution was not allowed on the premises of the Palms Motel. (R.T. I: p. 150, L. 25 – p. 151, L. 4.) Most of the time she would fill out a registration card when she would rent a room there. (R.T. I: p. 152, L. 9-11.)

Ms. Henderson was a convicted felon who had served time in state prison for a drug offense. (R.T. I: p. 147, L. 13-20.) In April of 1988 she agreed to engage in sexual activity with William Sheble and another man. (R.T. I: p. 140, L. 8-10.) On entering the office of the Palms Motel to get a room, petitioner told her that the men she was with were police. (R.T. I: p. 140, L. 11-22.) She obtained a total of $12.00 from Officer Sheble but did not obtain a room key. (R.T. I: p. 140, L. 23 – p. 141, L. 12.) On

this April 20, 1988 date she did not find out what happened to the $12.00 after she brought it to the motel office. (R.T. I: p. 149, L. 24-26.) Emma Henderson said that she did not suggest going to the Palms Motel. (R.T. I: p. 152, L. 19-22.) Doing so was the officers' idea. (R.T. I: p. 146, L. 24 – p. 147, L. 2.) She admitted to pleading guilty to a charge of prostitution sometime in the past. (R.T. I: p. 142, L. 6-8.)

William Sheble testified that he was a sheriff's officer with San Bernardino County working as a vice officer. (R.T. I: p. 235, L. 9-23.) On February 10, 1988 he went with Deputy Jo Ann Miller to the Palms Motel to investigate it. (R.T. I: p. 236, L. 15-18; p. 238, L. 10-15.) Then, on April 20, 1988, he saw Emma Henderson wave at him, so he drove to her, and she mentioned "half and half" for $15.00 apiece. (R.T. I: p. 242, L. 14 – p. 243, L. 28.) She took the undercover officer to the Palms Motel. (R.T. I: p. 244, L. 26 – p. 245, L. 2.)

Emma Henderson went into the motel office with $12.00 given to her by Officer Sheble to get a room, and returned to the van, where she saw a tape recorder in the officer's hand, so began to walk away down the street. (R.T. I: p. 245, L. 22 – p. 246, L. 24.) Officer Sheble then picked up Ms. Henderson again after he told her that he was not a police officer, after she accused him of that. (R.T. I: p. 246, L. 25 – p. 247, L. 11.) On the way to open Room 5 at the Palms Motel, Officer Sheble heard petitioner yell that he was an undercover officer. (R.T. I: p. 247, L. 12-22.) Soon after this, Emma Henderson turned and ran. (R.T. I: p. 247, L. 26 – p. 248, L. 5.) Petitioner said he wanted to see Officer Sheble's identification, because

he was "undercover." (R.T. I: p. 248, L. 6-14.) When petitioner did this, he called the officer "undercover," but not "undercover cop" or "undercover police." (R.T. II: p. 266, L. 27 – p. 267, L. 9.) And, he never said either the words "police officer" or "cop" in Emma Henderson's presence. (R.T. II: p. 267, L. 10-14.)

Special deputy sheriff Larry Mosley testified that he picked up Emma Henderson on April 20, 1988 and took her in a van to the Palms Motel, along with Officer Sheble. (R.T. I: p. 226, L. 22 – p. 227, L. 17.) She then went into the motel office, returned to the van, and began walking toward a room when Larry Mosley heard petitioner yell, "You're undercover. You're undercover," whereupon Emma Henderson began to run until she was caught and arrested by Deputy Mosley. (R.T. I: p. 227, L. 18 – p. 228, L. 16.)

Prior to petitioner saying anything, Emma Henderson was under constructive arrest for solicitation, and not free to leave. (R.T. II: p. 267, L. 15 – p. 268, L. 18.) Prior to this, Emma Henderson had suggested that Officer Sheble had "a bedroom on wheels," but he pushed her to pick a motel to go to. (R.T. I: p. 255, L. 10-21.)

Larry Mosley also testified that on February 10, 1988, while employed as a special deputy with the San Bernardino County Sheriff's Department, he rented a room from petitioner for one night for $35.00 (R.T. I: p. 222, L. 3 – p. 223, L. 14), and then observed about six couples arrive without luggage, rent motel rooms, and stay only about thirty minutes (R.T. I: p. 224, L. 13 – p. 225, L. 26.) The officer did not see what occurred in the rooms because

petitioner told him that he did not allow curtains to be opened in his motel room. (R.T. I: p. 226, L. 1-17.)

Jo Ann Miller testified that she was a San Bernardino County Sheriff's deputy on February 10, 1988, working undercover as a simulated prostitute with the Palms Motel as her "target." (R.T. I: p. 156, L. 8-16.) She went to the motel office and asked petitioner for a room for a short time; was told by him that the room had to rent for an hour; and she then rented a room for $10.00. (R.T. I: p. 158, L. 19 – p. 159, L. 14.) It was noted at trial that other motels also have hourly rates. (R.T. II: p. 265, L. 20-26.)

Jo Ann Miller did not think that she said who she was to petitioner when renting a room from him. (R.T. I: p. 159, L. 4-5.) She was not given a key. (R.T. I: p. 159, L. 27-28.) And, she was not asked to sign a registration card. (R.T. I: p. 160, L. 3-4.) The door to the room was unlocked. (R.T. I: p. 160, L. 3-4.)

The conversation between Deputy Miller and petitioner was tape recorded and reduced to transcript form. (R.T. I: p. 160, L. 10-26.) This and four other such conversations occurring on return visits to the motel that same day were included in Exhibit 20 and played for the jury. (R.T. I: p. 161, L. 11 – p. 162, L. 5.)

On the second visit to the office by Deputy Miller, petitioner was not present. (R.T. I: p. 163, L. 8-23.) She rented a room from this unknown person for $10.00 for an hour, and signed a registration card. (R.T. I: p. 163, L. 22 – p. 164, L. 8.) She went into a room with another officer, and stayed there for about 15 to 20 minutes before leaving. (R.T. I: p. 164, L. 14-16.)

On Deputy Miller's third trip to the motel office, she entered the office and told petitioner that she was with two people, but would just be in a room with one at a time, whereupon petitioner told her that she had to pay $10.00 per person. (R.T. I: p. 170, L. 10-18.) She left the office briefly, returned with $20.00, got a room, and was not required to sign a registration card. (R.T. I: p. 171, L. 22-28.) She did not receive a room key on this occasion. (R.T. I: p. 172, L. 1-2.) Reserve Deputy Dickerson stayed in the room with her for 10 to 15 minutes before all three persons left together. (R.T. I: p. 173, L. 19 – p. 174, L. 22.) She did not recall in what order the men entered the room. (R.T. I: p. 173, L. 21 – p. 174, L. 1.)

On the next return Deputy Miller came with Deputy Fedoruk. (R.T. I: p. 174, L. 23 – p. 175, L. 4.) Upon going to the office on this return visit, petitioner told her that some man had asked about her. (R.T. I: p. 175, L. 13-22.) Again she rented a room from petitioner for $10.00 for one hour. (R.T. I: p. 176, L. 27 – p. 177, L. 2.) She then went to the room with Deputy Fedoruk. (R.T. I: p. 177, L. 3-12.) They were there about 5 to 10 minutes when a buzzer went off, and Deputy Miller saw undercover operative Al Barnett standing near the motel office. (R.T. I: p. 179, L. 17 – p. 180, L. 20.)

Petitioner told Al Barnett that he had to pay for the room. (R.T. I: p. 181, L. 15 – p. 182, L. 2.) Al Barnett then paid petitioner for use of a room. (R.T. I: p. 182, L. 3-8.) No registration card was signed, and no room key was given. (R.T. I: p. 182, L. 12-16.) Jo Ann Miller and Al Barnett then went into a motel room and stayed there 5 to 10 minutes. (R.T. I: p. 182, L. 27 – p. 182, L. 6.) Petitioner was then placed under arrest. (R.T. I: p. 183, L. 7-11.)

Deputy Miller never referred to herself as a prostitute or to men with her as a "John." (R.T. I: p. 186, L. 7-17.) She never told petitioner that she was going to engage in a sex act in the rented room. (R.T. I: p. 186, L. 21-24.) The registration card signed by this witness as Exhibit 11 said above the signature line, "I certify that I am not a prostitute and will not use the room for purpose of prostitution." (R.T. I: p. 192, L. 15-27.) That form also says at the top, "No prostitution allowed," which was read by the undercover officer before she signed it. (R.T. I: p. 192, L. 28 – p. 193, L. 4.) A sign was in the office. (R.T. I: p. 193, L. 9-13.)

San Bernardino County Reserve Sheriff's Deputy Al Barnett testified about a tape-recorded conversation with petitioner admitted in tape form as Exhibit 21. (R.T. I: p. 200, L. 5-13.) This witness said that he did not know whether petitioner understood what "half and half" meant in a sexual context. (R.T. I: p. 214, L. 23-28.) The reserve deputy conceded that he never referred to Deputy Jo Ann Miller as a prostitute, and never told petitioner that he was going to perform a specific sex act with her. (R.T. I: p. 214, L. 3-19.)

In the conversation between Al Barnett and petitioner, petitioner said, "I don't know why they are coming. I just give them my room." (R.T. I: p. 215, L. 18-23.) Initially Al Barnett remembered receiving a key to a room, and signing a registration card in the motel office. (R.T. I: p. 219, L. 16-23.)

The defense offered no evidence at trial. (R.T. II: p. 273, L. 14-17.) Transcript Exhibits 20 and 21, and page 7 of

Transcript Exhibit 19 were read by the jury but not admitted into evidence, because they heard tape recordings of the conversations reported in those transcripts. (R.T. II: p. 280, L. 11-19.)

All money given for a motel room was retrieved by law enforcement officers on April 20, 1988. (R.T. II: p. 258, L. 6-9; p. 265, L. 27 – p. 266, L. 4.) On February 10, 1988 Officer Sheble also recovered all money paid by undercover officers for rooms at the Palms Motel on this date. (R.T. II: p. 268, L. 19 – p. 269, L. 18.)

Pronouncement of judgment was withheld, and petitioner was sentenced to serve 90 days in county jail on weekends, pay a stayed $4,000.00 fine, pay a restitution fine in the sum of $780.00, pay another fine in the sum of $530.00, and be on supervised probation for three years. (R.T. II: p. 342, L. 5 – p. 344, L. 13.) He is currently out on bail pending a final result on review of the judgment.

HOW THE FEDERAL QUESTION IS PRESENTED

Petitioner advances the argument that words uttered by him were protected by the First and Fourteenth Amendments to the United States Constitution as free speech, and that a specific intention to delay or obstruct an officer must be proven beyond a reasonable doubt as an essential element of delay or obstruction of a public officer offense. Petitioner raised this argument and the issue of misinstruction and incomplete instruction of the jury to both the California Court of Appeal and the California Supreme Court.

While this argument was rejected by the California Court of Appeal, and hearing was denied by the California Supreme Court, two justices of the California Supreme Court believed that the petition for review should have been granted. (See APPENDIX 1 and APPENDIX 2 attached.)

REASONS FOR GRANTING THE WRIT

This case presents the Court with an opportunity to announce the limits of nebulous and all-inclusive penal statutes that seek to punish delaying or obstructing a public officer engaged in the discharge of his official duties, when speech alone is assigned as the sole offending act. This Court's ruling in *Houston v. Hill*, 482 U.S. 451, 96 L.Ed.2d 398, 107 S.Ct. 2502 (1987) can be clarified and specifically applied to a much more prevalent penal statute than the city ordinance in issue in that case. Protected speech can be further defined within the meaning of the First Amendment to the United States Constitution as applied to the states through operation of the Fourteenth Amendment to the United States Constitution.

The state statute in issue (California Penal Code section 148) can either be declared unconstitutionally overbroad or unconstitutionally applied where, as in the instant case, specific intent to delay or obstruct a public officer is not made a required element of such an offense grounded entirely upon alleged words spoken by the defendant. The precious right of freedom of expression requires that the injustice below be rectified, and that guidance be given to other courts so that such an error is

not repeated. This case squarely presents the issue of balancing a person's right to freedom of expression against a public officer's right to carry out his or her official duties without undue interference or disruption.

Certiorari should also be granted here to address and remedy instances of erroneous and/or confusing jury instructions which can infect jury deliberations, and in turn make all verdicts resulting from such deliberations unreliable and subject to invalidation. Because the erroneous reading of a general intent instruction for a specific intent crime (California Penal Code section 148 in a verbal context) likely confused the jury below, the probability that such error also caused confusion concerning the legal standards for deciding alleged companion crimes is so great that the entire judgment of convictions below should be reversed.

ARGUMENT

I.

WHERE FREE SPEECH IS IN ISSUE, ORAL UTTERANCES ADVANCED BY THE STATE AS A BASIS FOR DELAY OR OBSTRUCTION OF A PUBLIC OFFICER ENGAGED IN THE DISCHARGE OF AN OFFICIAL DUTY MUST BE COUPLED WITH SPECIFIC INTENT TO DELAY OR OBSTRUCT THE OFFICER, IN ORDER TO SUSTAIN A CRIMINAL CONVICTION GROUNDED UPON SPOKEN REMARKS.

Petitioner was convicted of a violation of California Penal Code section 148, which in pertinent part provides that "Every person who willfully resists, delays, or obstructs any public officer, peace officer . . . in the

discharge or attempt to discharge any duty of his or her office or employment . . . is punishable by a fine not exceeding one thousand dollars ($1,000) or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment." To prove the charge the prosecution was required in all cases to prove the following elements of the offense: 1) resistance, delay, or obstruction; 2) of a public officer; 3) engaged in some official duty being discharged or being attempted to be discharged by the officer; 4) with willfulness on the part of the defendant. (*People v. Perry*, 79 Cal.App.2d Supp. 906, 907 (1947).)

In the case on review no physical resistance was even suggested by the prosecution, so delay or obstruction are the only prongs of the statute that could possibly be relied upon to prove that such an offense occurred. What duty was being discharged by William Sheble while petitioner uttered the words "You're undercover; you're undercover" was never clearly shown, since Emma Henderson was already in constructive police custody after having allegedly committed a criminal offense prior to the claimed delay or obstruction by petitioner. So, it appears that even the basic elements of a California Penal Code section 148 violation were not proven in the trial court below.

Additionally, to not run afoul of the constitutionally guaranteed right to freedom of expression, in a situation like the case on review, where utterances alone are cited as the basis for delay or obstruction, for a conviction of a violation of California Penal Code section 148 to stand, the prosecution must prove beyond a reasonable doubt that the defendant acted with the specific intention of

delaying or obstructing the officer in question. Because utterances are protected by the First Amendment to the United States Constitution, applicable to the states through operation of the Fourteenth Amendment to the United States Constitution, in the absence of such specific intent and words likely to cause a violent action against an officer or to cause a riotous stampede, mere words such as "You're undercover; you're undercover" cannot be held to constitute a violation of California Penal Code section 148. This is a logical application of the holding in *Houston v. Hill*, 482 U.S. 451, 96 L.Ed.2d 398, 107 S.Ct. 2502 (1987). For, " . . . the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." (*Id.*, 482 U.S. at 461, 96 L.Ed.2d at 412, 107 S.Ct. at 2509.)

> 'Speech is often provocative and challenging. . . . [But it] is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.' (*Id.*, citing *Terminiello v. Chicago*, 337 U.S. 1, 4, 93 L.Ed. 1131, 1134, 69 S.Ct. 894, 896 (1949).)

"First Amendment freedoms may not be infringed absent a compelling governmental interest. Even then, any governmental regulation must be carefully tailored, so that rights are not needlessly impaired." (*United Steelworkers of America v. Sadlowski*, 457 U.S. 102, 111, 72 L.Ed.2d 707, 715, 102 S.Ct. 2339, 2345 (1982), rehg. den. 459 U.S. 899, 74 L.Ed.2d 160, 103 S.Ct. 199 (1982).) Expressions of disapproval toward a peace officer fall "squarely within the protective umbrella of the First Amendment and any action to punish or deter such speech . . . is

categorically prohibited by the Constitution." (*Duran v. City of Douglas, Ariz.*, 904 F.2d 1372, 1378 (9th Cir. 1990).)

> A speaker may freely attack institutions, trades, occupations, groups, races, and ethnic majorities in this country in hopes that others will discriminate against them. Those who implement such abuses in response to an obnoxious exhortation may be punished under appropriate statutes. But one of the prices we pay to retain our liberty of expression is that the speaker may not, unless the speech is obscene or threatens to produce an immediate violent reaction. (*Long v. Valentino*, 216 Cal.App.3d 1287, 1295 (1989).)

Likewise, one may express his views in an orderly fashion on a public street when he is rightfully there. (*Flower v. United States*, 407 U.S. 197, 198-199, 32 L.Ed.2d 653, 656, 92 S.Ct. 1842, 1843 (1972).) The rights of a state to limit expressive activities on public streets are drawn within quite narrow confines. (*Perry Ed. Assn. v. Perry Local Ed. Assn.*, 460 U.S. 37, 45, 74 L.Ed.2d 794, 804, 103 S.Ct. 948, 954 (1983).) Because Emma Henderson was unlikely to become violent on hearing petitioner's spoken words, and the uttered words were not "fighting words," they were constitutionally protected, under Article I, section 2 of the California Constitution, as well as under the United States Constitution's First and Fourteenth Amendments.

The record below also fails to show that petitioner intended anything to happen as a result of his spoken words. He did not say "Run!" to Emma Henderson. And he made no move to interfere with her or Officer Sheble as petitioner spoke.

While this speech-centered alleged offense should have been treated at trial as a specific intent crime, the jury deciding petitioner's fate was not instructed that in order for it to return a guilty verdict for a violation of California Penal Code section 148, it must first determine that petitioner had a specific intent to resist, delay, or obstruct Officer Sheble in the conduct of his duties at the time petitioner said "You're undercover; you're undercover." There was also no showing that petitioner was directing his remarks to Emma Henderson rather than the officer.

The absence of a specific intent jury instruction for California Penal Code section 148, such as CALJIC 3.31 rather than CALJIC 3.30 which was given (see APPENDIX 4 and APPENDIX 5 attached); the verbal nature of the claimed delay or obstruction; and the lack of a defined duty that was allegedly interrupted by petitioner's protected speech should cause his conviction for resisting, delaying, or obstructing a public officer to be reversed. This will assure the " 'ceaseless vigilance' " required " ' . . . to prevent erosion [of First Amendment rights] . . . by the states.' " (*Stanley v. Georgia*, 394 U.S. 557, 563, 22 L.Ed.2d 542, 548-549, 89 S.Ct. 1243, 1247 (1969), citing *Roth v. United States*, 354 U.S. 476, 488, 1 L.Ed.2d 1498, 1509, 77 S.Ct. 1304, 1311 (1957).) The "immediate breach" of the peace hypothesized by the California Court of Appeal never materialized, and it is dangerous indeed to guess at the jury's conclusions, especially when it was misinstructed concerning the necessary elements of a California Penal Code section 148 offense.

If the statute in question is construed in any other fashion than to require a specific intent where speech is the crux of the alleged offense, it would both criminalize constitutionally protected speech and allow peace officers unconstitutional discretion in enforcing the statute, making the penal provision unconstitutionally overbroad and facially invalid, just as was found in *Houston v. Hill, supra.*

II.

THE TRIAL JUDGE MUST INSTRUCT THE JURY *SUA SPONTE* THAT SPECIFIC INTENT TO DELAY OR OBSTRUCT A PUBLIC OFFICER IS A REQUIRED ELEMENT OF DELAYING OR OBSTRUCTING A PUBLIC OFFICER, WHERE ORAL UTTERANCES ARE PRESENTED AS THE SOLE BASIS FOR SUCH POSSIBLE DELAY OR OBSTRUCTION.

For the reasons stated in Section I. above, and in conformity with a logical application of this Court's holding in *Houston v. Hill*, 482 U.S. 451, 96 L.Ed.2d 398, 107 S.Ct. 2502 (1987), the trial judge's failure to instruct the jury that California Penal Code section 148 requires a specific intent rather than a general one in the factual context presented, *sua sponte*, and to delineate the parameters of constitutionally protected free speech, constituted prejudicial and reversible error. A different result would probably have occurred if the jury had been instructed that it was required to find specific intent rather than general intent for any California Penal Code section 148 offense.

With respect to failure to properly instruct a jury, "It cannot be said that, under correct instructions, a different

verdict would have been improbable; therefore, the erroneous rulings constitute a miscarriage of justice, within the meaning of the constitutional provision," which until November 8, 1966 was Article VI, section 4½, and is now Article VI, section 13 of the California Constitution. (*People v. Hamilton*, 33 Cal.2d 45, 51, 198 P.2d 873, 877 (1948).) Reversal is appropriate because " . . . it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of the errors committed by the trial court in failing to give an instruction on the law . . . ," as in *People v. Bevins*, 54 Cal.2d 71, 78, 351 P.2d 776, 780 (1960). " . . . the court has a duty to give instructions on the general principles of law governing the case, even though not requested by the parties, but it need not instruct on specific points developed during trial unless requested. . . . " (*Id.*, 54 Cal.2d at 77, 351 P.2d at 780.) Instruction on the correct intent to be applied to the statute was an essential principle of law governing the case on review, so the trial judge breached a *sua sponte* duty in not reading the jury a specific intent instruction concerning an alleged violation of California Penal Code section 148. "An instruction is necessary if it is vital to a proper consideration of the evidence by the jury." (*People v. Putnam*, 20 Cal.2d 885, 890, 129 P.2d 367, 370-371 (1942); *People v. Baker*, 42 Cal.2d 550, 576, 268 P.2d 705, 721 (1954).)

Concerning an examination of the record for a miscarriage of justice, "Error in an instruction which ordinarily would not prejudice the rights of a defendant may justify a reversal of the judgment where the jury is misdirected or misled upon an issue vital to the defense and the evidence does not point unerringly to the guilt of the

person accused." (*People v. Rogers*, 22 Cal.2d 787, 807, 141 P.2d 722, 732 (1943); *People v. Robinson*, 61 Cal.2d 373, 395, 392 P.2d 970, 984 (1964).) A requirement of specific intent is an issue that was vital to the defense at trial, and petitioner's behavior was so innocuous that it can hardly be said that the evidence pointed unerringly to his guilt with respect to a violation of California Penal Code section 148.

Article VI, section 13 of the California Constitution provides as follows:

> No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

An examination of the entire record below clearly reveals that a miscarriage of justice occurred at petitioner's trial. This manifest injustice deprived petitioner of the fair trial to which he was entitled pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, and pursuant to Article 1, section 15 of the California Constitution. The prejudicial errors committed cry out for remediation.

III.

THE TRIAL COURT'S FAILURE TO PROPERLY INSTRUCT THE JURY ON THE REQUISITE INTENT REQUIRED FOR A CRIMINAL CONVICTION INFECTED JURY DELIBERATIONS TO SUCH AN EXTENT THAT PETITIONER WAS DEPRIVED OF A FAIR TRIAL CONCERNING ALL COUNTS CHARGED AGAINST HIM.

The failure to properly instruct the jury about the requisite intent for a California Penal Code section 148 violation adversely affected more than just the verdict directed toward that count of the amended information. All verdicts were infected by what must have been confused and easily awry jury deliberations. Taking into account that the jury was read special intent instructions addressed to the pandering and attempted pimping charges (C.T.: p. 250, pp. 252-254, and p. 257, reproduced and attached respectively as APPENDIX 5, APPENDIX 6, and APPENDIX 7), along with a general intent instruction addressed to pimping, maintaining a disorderly house, and obstructing a peace officer (C.T.: p. 249, reproduced and attached as APPENDIX 4), it is impossible to know how jurors resolved the conflicting instructions or " . . . to determine from the evidence which of the conflicting instructions formed the basis of the verdict reached by the jury" for each individual count. (See *People v. Kirkes*, 39 Cal.2d 719, 729, 249 P.2d 1, 7 (1952), and *People v. Bernhardt*, 222 Cal.App.2d 567, 593 (1963).) This is especially true since jurors were told of one required intent for the crime of attempted pimping and another for the crime of pimping.

What is known with assurance is that jurors were misinformed about the appropriate intent required for a violation of California Penal Code section 148 that involved speech alone. That is enough by itself to invalidate the verdict dealing with that charge (see *People v. Zerillo*, 36 Cal.2d 222, 232, 223 P.2d 223, 229-230 (1950)), and to result in infection of the remainder of verdicts reached. Under these circumstances, all verdicts returned are cast in substantial doubt, because the inconsistent and erroneous instructions given to the jury resulted in a clear miscarriage of justice and should be found to constitute reversible error. (*Id.*, 36 Cal.2d at 233, 223 P.2d at 230; *People v. Kirkes, supra*, 39 Cal.2d at 729, 249 P.2d at 7.)

CONCLUSION

For all of the reasons stated above, petitioner submits that justice and a need to clarify the permissible interaction of persons exercising their free speech rights with a public officer's right not to be delayed or obstructed in the performance of his or her duties present this Court with ample reasons to issue the writ prayed for. Accordingly, petitioner respectfully requests that the Court issue a writ of certiorari to review the decision of the California Court of Appeal in this case.

Respectfully submitted,

/s/ Dennis S. Tilton
DENNIS TILTON
Attorney for Petitioner
Thakorbhai L. Patel

APPENDIX 1

NOT FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. THAKORBHAI L. PATEL, Defendant and Appellant.	E007180 (Super.Ct.Nos. 47384/48604) OPINION FILED SEP 11 1990

Appeal from a judgment of the Superior Court of San Bernardino County. James A. Edwards, Judge. Affirmed.

Dennis S. Tilton for Defendant and Appellant.

John K. Van De Kamp, Attorney General, Richard B. Iglehart, Chief Assistant Attorney General, Harley D. Mayfield, Senior Assistant Attorney General, Robert M. Foster, Supervising Deputy Attorney General, and M. Howard Wayne, Deputy Attorney General, for Plaintiff and Respondent.

Facts

In consolidated actions, a jury convicted Thakorbhai Patel of pandering (Pen. Code[1], § 266i), attempted

[1] All further code references are to the Penal Code unless otherwise indicated.

pimping (§§ 664/266h), pimping (§ 266h), maintaining a disorderly house (§ 316), and resisting/obstructing/delaying an officer (§ 148). He was granted probation and appeals, claiming insufficiency of the evidence and jury instruction error. We reject his contentions and affirm. The pertinent facts surrounding each count will be discussed below.

1. *Insufficient Evidence*

a. *Of Pandering*

As to count 1, Patel was charged with "willfully, unlawfully, and by threats, violence, promises, a device, and scheme, caus[ing], persuad[ing], and encourag[ing] [an undercover policewoman posing as a prostitute] to become a prostitute.[2] He now claims there was insufficient evidence to support his conviction of this offense.

The evidence at trial showed that the undercover policewoman, dressed in a conspicuous fashion, went to Patel's motel for the first time around 3 p.m. on February 10, 1988. She asked him how much it would cost to rent a

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[2] In his reply brief, Patel claims, as a further basis for his argument the evidence was insufficient, that the facts did not demonstrate that he "successfully induced a person to become an inmate of a house of prostitution. . . . " A violation of section 266i can be committed in one of several distinct ways. (*People v. Fixler* (1976) 56 Cal.App.3d 321, 327, disapproved on other grounds in *People v. Freeman* (1988) 46 Cal.3d 419, 426, fn. 6.) The manner described by Patel above relates to subdivision (c) of section 266i, with which Patel was *not* charged, having been accused instead under subdivision (b).

room "for a short time."[3] Patel replied, "If you do *work* short time, we don't give [you a] room." (Emphasis added.) He then informed her that she would have to rent the room by the hour, which she said would cost $10. She gave him the money. Patel did not ask her to sign a registration card and he did not provide her with a key as the door to the room she was given was not locked. She walked to the room accompanied by a male undercover officer who was posing as her customer. They remained in the room for 15-20 minutes, then departed in the latter's van.

She returned a second time and was waited on in the motel office by someone other than Patel. He asked her to sign a registration card and she again rented a room for $10 a hour. She entered the room with another male undercover officer, stayed 15-20 minutes and left with him.

She returned a third time around 6 p.m. with two undercover male officers. When Patel asked her how many she had with her, and she told him, he informed her she could not have more than one in the room. She told Patel, " . . . I was going to *do* both, . . . one . . . at a time. I was gonna have one go in and then come out and then another one." (Emphasis added.) Patel informed her that it would cost her $10 for each of the two men. She told him she would go out to the vehicle in which they were waiting in the parking lot and tell them. She returned to the office and told Patel she was renting the

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[3] Another undercover police officer testified at trial as an expert witness that "short time" in prostitute parlance referred to the time it takes a customer to reach orgasm.

room for the two, and she paid him $20. Patel did not have her sign a registration card and he provided her no key. She went into the room and left a half-hour later.

A short time thereafter, a male undercover officer posing as a "big spender" came to the motel looking for the female officer. Patel instructed him to wait for her. Patel told him that "girls . . . [¶] don't [stay] overnight" at his motel, "[o]nly [a] short time." He told the officer he had hourly rates. Patel also told the officer that the latter could "get girls" at a local bar and he provided him with directions to it. The officer then left.

After a short time, the female officer reappeared with another male undercover officer and Patel told her about the man who had been there looking for her. She confirmed that she had told the man to meet her there at 7 p.m. Patel told her he had informed the man to come back for her. She replied, " . . . [G]ood . . . because I can't believe I'm doing good tonight . . . I'm making some money, but that man is high dollars, real high dollars." Patel repeated to her that he told the man to come back and she again expressed pleasure at the prospect. She then told Patel that she had a gentleman with her and she needed a room right then. Patel offered to tell the "big spender" when he returned to wait for her. Patel told her "[when] you . . . finish up . . . [¶] . . . you wait in the room" for the "big spender" as he would send him up to her when he arrived. He also informed her that he would need another $10 when the "big spender" arrived. She told Patel that she was making a lot of money that night and he acknowledged same. She asked him if the following night she could rent a room for the entire night for one price thus avoiding having to pay "per head." He

said she could not, that she would have to "pay by the man," $10 each time. Patel explained this was so because he had the rooms cleaned after each use. She gave Patel $10 for the room, signed no card and received no key. She went to the room with the undercover officer who had accompanied her to the motel.

After being in the room for awhile, a buzzer inside the room went off. She walked outside and saw the "big spender" standing talking to Patel. Patel had already told him to wait for the woman as she was "busy." When the three met, Patel asked for $10 for the room. The "big spender" asked, " . . . [D]oes this come out of the 50 bucks for the half and half[4] or what?" The female said no and Patel laughed. The female told the "big spender" that he had to pay for the room. He handed Patel a $50 bill and Patel gave him $40 in change. Patel then wished him luck. Patel did not have them sign a registration card and he provided no key. They went into the room and emerged 5-10 minutes later.

Still another undercover officer who had rented a room for the same night, paying $35 and signing a registration card, saw six couples besides his fellow officers go into various rooms that evening, without luggage, and stay only about a half-hour before leaving. He watched them, and surreptitiously photographed some of them, through the open window of the room he had rented. At one point, Patel came to his room and told him it was

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[4] This undercover officer testified at trial as an expert witness that "half and half" meant half vaginal sex and half oral sex.

against the policy of the motel for him to have the curtains of his window open.

As the People contended at trial and here on appeal, the foregoing facts demonstrate that Patel provided a clean, anonymous and relatively secluded haven for what he knew were prostitution activities[5] and he did so with the intention of encouraging and, in fact, did encourage someone he believed to be a prostitute to ply her trade. Thus, substantial evidence supports the conviction.

In his brief, Patel makes a number of assertions and cites a number of cases which he argues undermine the verdict. They do not. First, he states, "Appellant was not shown by either direct or circumstantial evidence to have the required specific intent to influence [the undercover policewoman] to become a prostitute. (See *People v. Mathis* (1985) 173 Cal.App.3d 1251.)" The evidence demonstrates otherwise. Moreover, *Mathis* has no application to this issue. In *Mathis*, the issue was over a jury instruction that defined "procure" in such a way that the defendant could be guilty of pandering simply by assisting, or aiding and abetting, an act of prostitution. Division One of this court held that the requisite intent to influence a person to become a prostitute may be inferred from acts of assistance, but intent was not *necessarily* shown by assistance. (*Id.*, at pp. 1255-1256.)

Patel goes on to assert, "Appellant did not seek out the [female] undercover officer to encourage her to

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[5] It was entirely reasonable for the jury to infer Patel knew what was going on in his motel from his conversations with the female officer and with the "big spender."

become a prostitute. (See *People v. Osuna* (1967) 251 Cal.App.2d 528.) *Osuna*, however, does not support Patel's claim that the defendant must seek out the potential prostitute. *Osuna* dealt with a subdivision of section 266i not relevant here which punishes placing a female in a locale where prostitution is allowed or encouraged. The sole issue relevant to section 266i in *Osuna* was whether the hotel room the defendants supplied qualified as a house of ill repute.

Patel next claims, "Neither did he offer to pay her to engage in sexual activities, as in *People v. Bell* (1988) 201 Cal.App.3d 1396." However, *Bell* did not hold that such activity, and none other, was necessary to sustain a conviction under section 266i. In fact, *Bell* held, "This statute covers a wide range of behavior and we need not here attempt to delineate its full scope, or determine whether its proscriptions would or would not apply to the hypotheticals advanced by appellant. It is sufficient for our present purpose to hold that its wording is broad enough to encompass the situation where, as here, one adult offers to pay money to another to induce a young child to engage in sexual activities." (*Id.*, at pp. 1399-1400.)

Patel further argues, "Nor did he seek to expand a known prostitute's operation. (*People v. Jeffers* (1987) 188 Cal.App.3d 840; *People v. Almodovar* (1987) 190 Cal.App.3d 732.) [*Sic.*]" Neither of these cases so hold, nor do they even address such an issue. Instead, they quote *People v. Hashimoto's* (*People v. Hashimoto* (1976) 54 Cal.App.3d 862) holding that section 266i was designed to "discourag[e] persons . . . from augmenting and

expanding a prostitute's operation, or increasing the supply of available prostitutes[,]" in the context of the severity of the sentence imposed for violations of the section.

Next Patel contends, "Without any proof that appellant had full knowledge of the nature of an act of prostitution that would take place, he cannot properly stand convicted of pandering by encouraging. (See *People v. Montgomery* (1941) 47 Cal.App.2d 1, 22.)[6] First, as stated above, it is reasonably inferable from the evidence that Patel was well aware of the nature of the female officer's apparent activities. Moreover, *Montgomery* does not stand for the proposition that the defendant must have such knowledge on page 22 or any other page for that matter. The import of what the court holds on that page is as follows: "Appellant concedes that 'all appellant did was to permit [the prostitute] to work as [one] in houses of appellant.' This admission of appellant effectively disposes of all of her contentions as to the sufficiency of the evidence, for if appellant knowingly permitted [the prostitute] to work for appellant . . . in appellant's houses of prostitution appellant was guilty of having procured the said female person as an inmate for a house of prostitution within the meaning of the . . . pandering act."

Finally, Patel points out that his activities here were far different from those of the motel manager in *People v. Frey* (1964) 228 Cal.App.2d 33. However, *Frey* does not hold that the activities in it, *and only those*, are all that constitute a violation of section 266i. As decisions Patel

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[6] *Montgomery* was disapproved on other grounds in *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 301, fn. 11, and in *People v. Dillon* (1983) 34 Cal.3d 441, 454, fn. 2.

himself cites hold, section 266i covers a wide variety of activities. Patel's points have no merit.

b. *Of Attempted Pimping*

Patel claims there was insufficient evidence to sustain his conviction of attempted pimping on February 10. Section 266h, of which he was convicted in this regard, provides: "Any person who, knowing another person is a prostitute, lives or derives support or maintenance in whole or in part from the earnings or proceeds of the person's prostitution, or from money loaned or advanced to or charged against that person by any keeper or manager or inmate of a house or other place where prostitution is practiced or allowed, or who solicits or receives compensation for soliciting for the person, is guilty of pimping . . . . " The jury here was instructed as to only the first half of the section, no reference being made to the solicitation portion.[7] Ignoring this fact, Patel argues,

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[7] The jury was instructed:

"Defendant is accused in Count [ ] 2 of the information of having attempted to commit the crime of pimping, a violation of Section [s] 664/266h of the Penal Code . . . .

"Every person who, knowing another person is a prostitute, lives or derives support or maintenance in whole or in part from the earnings or proceeds of that other person's prostitution, or from money loaned or advanced to or charged against that other person by any keeper or manager or inmate of a house or other place where prostitution is practiced or allowed, is guilty of the crime of pimping in violation of Penal Code Section 266h.

(Continued on following page)

"[O]ne is not guilty of this offense unless he got money for solicitation on behalf of a prostitute for attempted pimping." As this court made clear in *People v. McNulty* (1988) 202 Cal.App.3d 624, 630, "[S]ection 266h can be violated in either of two basic ways: (1) by *deriving support* from the earning of another's act of prostitution *or* (2) by *soliciting*. In order to violate the statute by soliciting, there must be *either* the receipt of compensation for soliciting for a prostitute *or* the solicitation of compensation for soliciting for a prostitute.[8] (*People v. Smith* (1955) 44 Cal.2d 77, 79 . . . .)" (Emphasis added and original.) In *People v. Frey, supra,* 228 Cal.App.2d at page 53, the court held, "Appellant . . . contends that [his] renting a room in the hotel [he owned and managed] to a prostitute could not constitute receiving money from the proceeds of prostitution. The evidence in the present case shows an

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(Continued from previous page)

"In order to prove such crime each of the following elements must be proved:

"1. A person knew that another person was a prostitute, and

"2. Such person lived or derived support or maintenance in whole or in part from the earnings or proceeds of the other person's prostitution, or from money loaned or advanced to or charged against that other person by any keeper or manager or inmate of a house or other place where prostitution is practiced or allowed[.]

"Prostitution is engaging in sexual intercourse or any lewd act between persons for money or other consideration."

[8] Patel's reliance on this sentence is misplaced as the jury was never given the option of convicting him based on solicitation.

arrangement whereby appellant did derive additional rent from the tenants that were provided prostitutes. . . ." Likewise, evidence here showed that Patel derived income from renting the rooms for purposes of prostitution in addition to that which he normally charged for an overnight stay. In fact, he would not allow the female undercover officer to rent for the entire night, as he had the male officer, insisting that she pay "per man."

Patel further asserts that "since he had no knowledge that [the undercover policewoman] was a prostitute (or even a simulated one), and . . . prostitution . . . activities were not expressly discussed by appellant and her . . . appellant was convicted on insufficient evidence of attempted pimping." First, as stated before, we disagree that the evidence did not permit a reasonable inference that Patel believed the female officer to be a prostitute. Certainly, his conversations with her and with the "big spender" indicated otherwise. Moreover, Patel cites no precedent requiring one convicted of pimping to have expressly discussed illegal activities with the prostitute,[9] although this too is reasonably inferable from the facts deduced at trial. Patel's point has no merit.

c. *Of Pimping*

Patel claims there was insufficient evidence to support his conviction of pimping on April 20, 1988, a little over two months after the first incident. On that day, two

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[9] Nor is there any requirement, as Patel asserts in his reply brief, that his entire motel business was " 'primarily a pimping operation[.]' "

male undercover police officers riding in a van picked up a prostitute, who directed them to Patel's motel. At trial, she admitted frequenting the motel at least once a week and said she committed acts of prostitution there. She said she rented rooms from Patel and paid $8-12 for one or two hours, often not signing a registration card. On the way to the motel, the officers and the prostitute agreed that she would perform sexual services for them for $15 each. Upon reaching the motel, the officers gave the prostitute $10 for the room rental, but she returned to the van saying she needed another $2. They gave her the money and she paid Patel in the office. She returned to the van and one of the officers began walking towards the room with her. They had no key, but the room was unlocked. Before they were able to go inside, Patel spotted the officer and recognized him as one who had been involved in the February sting operation. He yelled out that the officer was "undercover" and the prostitute took off running, but was stopped by the other officer. Patel later admitted that he had filled out a registration card for the prostitute, claiming she did not know how to write.

As to his insufficiency of the evidence claim, Patel reasserts the points he made in connection with the attempting pimping count, all of which have already been disposed of here. Additionally, as to the facts surrounding this particular count, he claims that the evidence did not show that he knew the prostitute definitely was one. However, as with the female undercover officer during the February incident, this is reasonably inferable from the fact that the woman had rented rooms for short periods of time from Patel in the past and from the type

of activities occurring at the motel as observed by the officers in February.

d. *Of Maintaining a Disorderly House*

The jury was instructed as to this count that "Every person who keeps any disorderly house, or any house for the purpose of prostitution, or any house of public resort, by which the peace, comfort, or decency of the immediate neighborhood is habitually disturbed, or who keeps any inn in a disorderly manner; and every person who lets any apartment or tenement, knowing that it is to be used for the purpose of prostitution, is guilty of a misdemeanor." (CALJIC No. 16.420.)

As with all his other arguments, Patel focuses on one definition of the charged offense and claims there was insufficient evidence of that definition, ignoring the fact that the evidence fits one or more of the other definitions. In this case, he claims there was insufficient evidence he kept a disorderly house because people at his motel were not disturbing others and exposing themselves, which would fit under the third alternate definition of the crime. The fact remains that the evidence here showed that Patel maintained a motel in which he knowingly permitted and assisted acts of prostitution, for which he made a profit. Therefore, he kept a house for the purpose of prostitution.

e. *Of Resisting/delaying/obstructing an Officer*

Patel first claims that there was insufficient evidence to sustain his conviction because there was no resistance.

Again, he ignores the alternate aspects of the crime, namely, delaying and obstructing which were demonstrated when he identified the officer as being undercover, which caused the prostitute to take off running and prematurely ended the sting operation. Patel also claims it was unclear what duty the officer was performing since the prostitute was already "in constructive custody after having committed a criminal offense" which, we presume, was her solicitation of the officers in the van. Without voicing our opinion whether the prostitute was indeed in constructive custody at the time of Patel's interference, we need only say that even if she was, this fact is irrelevant. If the officers' only objective was to arrest her, they would have done so in the van. Obviously, their overriding purpose was to investigate activities at Patel's motel and that operation was ongoing until Patel caused its premature termination.

Patel also claims that his actions cannot constitute a violation of section 148, which governs resisting, obstructing and delaying an officer, because they were protected speech under *Houston v. Hill* (1987) 482 U.S. 451. In *Hill*, the Supreme Court struck down as facially invalid for overbreadth a city ordinance that prohibited anyone from "interrupt[ing] any policeman in the execution of his duty . . . ." The Court concluded that the law should have been limited to words that " ' "inflict injury or tend to incite an immediate breach of the peace." ' " However, the jury here could have reasonably concluded that Patel's words were designed to and did in fact incite such an immediate breach, i.e., the prostitute's running from the scene. Therefore, we are not persuaded that *Hill*

prohibits a finding of guilt as to section 148 here.[10] Beyond that, there is no precedent holding that section 148 is facially invalid.

2. *Jury Instruction*

Patel argues that under compulsion of *Hill* and a case which he in his reply brief concedes was decertified by the California Supreme court, the trial court was obliged, sua sponte, to instruct that a violation of section 148 required specific intent. *Hill* makes no such holding, and, of course, the decertified case is of no value. In the absence of any other authority, which Patel fails to cite, we are compelled to reject his contention.

DISPOSITION

The judgment is affirmed.

NOT FOR PUBLICATION

/s/ Hollenhorst
Acting P.J.

We concur:

/s/ Dabney
J.

/s/ Timlin
J.

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[10] Nor can we agree with Patel that *Hill* requires the impediment to the officer to be *physical*. Hill made no such holding.

APPENDIX 2

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

Fourth Appellate District, Division Two,
No. E007180
S018014

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

(Filed Nov. 28, 1990)

THE PEOPLE, Respondent

v.

THAKORBHAI L. PATEL, Appellant

Appellant's petition for review DENIED.

Mosk, J. and Broussard, J. are of the opinion the petition should be granted.

LUCAS
Chief Justice

APPENDIX 3

COURT OF APPEAL
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO

** REMITTITUR **

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff-Respondent VS. PATEL, THAKORBHAI L Defendant-Appellant	)	Case No. E007180 Superior Ct. No. SCR47384 County of San Bernardino

I, STEPHEN M. KELLY, Clerk of the Court of Appeal, State of California, Fourth Appellate District, certify the attached is a true and correct copy of the original opinion or decision entered in the above entitled cause on September 11, 1990 and this opinion or decision has now become final.

Witness my hand and seal of the Court this December 3, 1990.

Stephen M. Kelly, Clerk

By: ROBERT CONN
Deputy Clerk

cc: All parties (Copy of remittitur only, Rule 25(e), California Rules of Court).

APPENDIX 4

No. . . . . .

In the crime[s] charged in Count[s] 3, 4, and 5 of the information, [namely,] pimping, maintaining a disorderly house, and obstructing a peace officer, there must exist a union or joint operation of act or conduct and general criminal intent. To constitute general criminal intent it is not necessary that there should exist an intent to violate the law. When a person intentionally does that which the law declares to be a crime, [he] [she] is acting with the general criminal intent, even though [he] [she] may not know that [his] [her] act or conduct is unlawful.

Given:

/s/ James A. Edwards
Judge

EXACT COPY OF CALJIC 3.30 (FIFTH EDITION)
CONCURRENCE OF ACT AND GENERAL CRIMINAL INTENT

APPENDIX 5

No. . . . . .

In [each of] the crime[s] [and] [allegations[s]] charged in Count[s] 1 & 2, and of] the information, [namely,] pandering, attempted pimping and ___, there must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator. Unless such specific intent exists the crime [or allegation] to which it relates is not committed.

[The specific intent required is included in the definition[s] of the crime[s] [or] [allegation[s]] charged.]

[The crime of ___ requires the specific intent to ___.]

[And the crime of ___ requires the specific intent to ___.]

[And the allegation of ___ requires the specific intent to ___.]

Given:

/s/ James A. Edwards
Judge

EXACT COPY OF CALJIC 3.31 (FIFTH EDITION)
CONCURRENCE OF ACT AND SPECIFIC INTENT

APPENDIX 6

No. . . . . .

[Defendant [___] is accused in [Count[s] 1 of] the information of having committed the crime of pandering, a violation of Section 266i of the Penal Code.]

Every person who with the specific intent to influence another person to [become] [or] [continue to be] a prostitute,

[by promises, or by any device or scheme, causes, induces, persuades or encourages another person to become a prostitute],

[receives or gives, or agrees to receive or give, any money or thing of value for procuring, or attempting to procure, another person for the purpose of prostitution, or to come into this state or leave this state for the purpose of prostitution], is guilty of a violation of Section 266i of the Penal Code.

In order to prove the commission of such crime, the following elements must be proved:

[1. A person by promises, or by any device or scheme, caused or induced, persuaded or encouraged another person to become a prostitute,] or

[1. A person received or gave, or agreed to receive or give, money or thing of value for procuring or attempting to procure another person for the purpose of prostitution, or to come into this state or to leave this state for the purpose of prostitution,] and

2. Such procuring, causing, inducing, encouraging or persuading was accomplished by [promises], [or] [any device or scheme], and

3. The person procuring, causing, inducing, persuading or encouraging engaged in such conduct with the specific intent to influence the other person to [become] [or] [continue to be] a prostitute.

Prostitution is engaging in sexual intercourse or any lewd act between persons for money or other consideration.

Given:

/s/ James A. Edwards
Judge

EXACT COPY OF CALJIC 10.71 (FIFTH EDITION)
PANDERING - DEFINED

APPENDIX 7

No. . . . . .

An attempt to commit a crime consists of two elements, namely, a specific intent to commit the crime, and a direct but ineffectual act done toward its commission.

In determining whether or not such an act was done, it is necessary to distinguish between mere preparation, on the one hand, and the actual commencement of the doing of the criminal deed, on the other. Mere preparation which may consist of planning the offense or of devising, obtaining or arranging the means for its commission, is not sufficient to constitute an attempt. However, acts of a person who intends to commit a crime will constitute an attempt where those acts clearly indicate a certain, unambiguous intent to commit that specific crime. Such acts must be an immediate step in the present execution of the criminal design, the progress of which would be completed unless interrupted by some circumstance not intended in the original design.

Given:

/s/ James A. Edwards
Judge

EXACT COPY OF CALJIC 6.00 (FIFTH EDITION)
ATTEMPT – DEFINED

No. 90-1335

FILED
MAR 29 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

KENNETH P. NOLAN AND VERNON T. JUDKINS,

Petitioners,

—v.—

THE BOEING COMPANY, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

I.

Does this case present any issue appropriate for Supreme Court resolution when (a) the Court of Appeals' decision does not conflict with any holding of this Court or any other Court of Appeals, (b) statutory changes during the pendency of this case give it a unique factual and procedural posture unlikely to reoccur, and (c) further statutory changes substantially redefine for future cases the issues resolved by Court of Appeals?

II.

Does the removal provision of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1441(d), permit a third-party foreign state defendant to remove an entire civil action where there is at least minimal diversity between the parties to the other claims?

III.

Should this Court alter the well-established and uniformly applied rule that a party entitled to remove an action on the basis of that party's identity or status removes an entire civil action when the party is sued as a third-party defendant?

LIST OF PARTIES

Those parties not listed in the caption herein include the following:

A. Defendants

1) General Electric Company ("GE")
2) CFM International, Inc. ("CFMI, Inc.")

B. Third-Party Defendants

1) Societe Nationale d'Etude et de Construction de Moteurs d'Aviation, S.A. ("SNECMA")

RULE 29.1 LISTING OF AFFILIATED CORPORATIONS

A. General Electric Company

The General Electric Company has a number of subsidiaries in the United States and elsewhere. There are, however, only a limited number of these subsidiaries that have any outstanding equity or debt securities that are publicly held. These are:

Dart & Kraft Financial Corporation
GECC Financial Corporation
General Electric Capital Corporation (formerly General Electric Credit Corporation)
General Electric Capital Canada, Inc.
General Electric Credit International, N.V.
General Electric Financial Services, Inc.
General Electric Overseas Capital Corporation
Montgomery Ward Credit Corporation

The public holdings of Dart & Kraft Financial Corporation, GECC Financial Corporation, General Electric Capital Corporation, General Electric Capital Canada, Inc., General Electric Credit International, N.V., General Electric Financial Services, Inc., General Electric Overseas Capital Corporation, and Montgomery Ward Credit Corporation are limited to debt securities.

General Electric Company itself has common stock and debt securities that are publicly traded.

In addition, General Electric Company owns 50% of Montgomery Ward & Co., Incorporated, which has publicly held debt securities and 51% of CAMCO, Inc. (Canada), which has publicly held equity securities.

B. CFM International, Inc.

There are no parent companies, subsidiaries, or affiliates to list for this party.

C. Societe Nationale d'Etude et de Construction de Moteurs d'Aviation, S.A. (SNECMA)

SNECMA has several subsidiaries and affiliates. They are:

Compagnie Generale des Turbomachines, S.A. (CGTM)
Corse Composites Aeronautiques, S.A.
Famer, S.A.
Fabrications Mecaniques de l'Atlantique, S.A. (FAMAT)
FN Moteurs
Hispano-Suiza, S.A.
Messier-Bugatti, S.A.
Office d'Exportation de Materiels Aeronautiques, S.A. (OFEMA)
Sochata, S.A.
Societe Europeenne de Propulsion, S.A. (SEP)
Societe Europeenne d'Analyse et Programmation, S.A. (SEDAP)
Societe de Reparation et d'Entretien de Compresseurs Speciaux, S.A. (SORECOS)
Societe d'Exploitation des Materiels Martin Baker, S.A. (SEMMB)
Vallaroche
Vallaroche Investissements

D. The Boeing Company

There are no parent companies, subsidiaries, or affiliates to list for this party.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

The Petition seeks the issuance of a Writ of Certiorari to review the order and judgment of the United States Court of Appeals for the Fifth Circuit, *Nolan v. Boeing Co.*, 919 F.2d 1058 (5th Cir. 1990) (pages 1-27 of the Appendix to the Petition), that unanimously affirmed orders of the United States District Court for the Eastern District of Louisiana denying Petitioners' motion to remand (App. 28-33) and granting Respondents' motion to dismiss on the ground of *forum non conveniens*. Petitioners challenge only the remand decision; their Petition does not present to this Court any questions

concerning the propriety of the dismissal of their claims on the ground of *forum non conveniens*.

COUNTERSTATEMENT OF THE CASE

These sixteen consolidated civil actions arise out of the January 8, 1989 crash of a Boeing 737-400 aircraft operated by British Midland Airways, Ltd. ("BMA"), a regional airline operating principally within the United Kingdom. The crash occurred while the aircraft was on a scheduled flight from London, England, to Belfast, Northern Ireland. The claimants in these actions, all of whom are citizens of foreign countries (mostly the U.K.) and reside outside the United States, are injured passengers, crew, bystanders, and the surviving relations of forty-six persons killed in the accident. Petitioners brought suit in Louisiana state court against Boeing, the manufacturer of the aircraft, GE, one of the two engine manufacturers, and CFMI, Inc., a corporation jointly-owned by GE and SNECMA, the other engine manufacturer. None of the events giving rise to the accident occurred in Louisiana; Louisiana's sole contact with this matter is that Boeing and GE have unrelated business activities there that subject them to the general jurisdiction of the Louisiana courts.

These cases present unusual facts in a unique procedural context. Although Petitioners claim in this Court that they originally chose to file this lawsuit in Louisiana because "they could obtain jurisdiction over all the primary defendants" (Pet. 14), it is obvious that economy of litigation was not Petitioners' motivation. Petitioners failed to bring suit against the most significant potential defendant: BMA.[1] Indeed, the Air Accidents Investigation Branch ("AAIB") of the U.K. Department of Transport, which investigated the accident, concluded that the cause of the accident was incorrect action on the part of the BMA crew. Petitioners presum-

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1 Respondents are informed and believe that, after the Court of Appeals' decision, claimants sued BMA in England.

ably did not name BMA as a defendant in these actions because BMA does no business in Louisiana and the Louisiana courts could not obtain jurisdiction over BMA.

Petitioners also failed to sue SNECMA, an equal participant with GE in the design and manufacture of the accident aircraft's engines. Indeed, after Boeing added SNECMA, Petitioners objected that SNECMA was *not* subject to the jurisdiction of the Louisiana courts for claims arising out of this accident—a contention they repeat in their Petition.[2] (Pet. 3)

Petitioners' real motivation for filing these actions in Louisiana was their hope that the Louisiana state courts would not apply the doctrine of *forum non conveniens* to dismiss the actions for refiling in the United Kingdom. Thus, claimants tried to structure the cases so that the federal courts would lack diversity jurisdiction even though all claimants were foreign and all the defendants were United States corporations. In order to accomplish this goal, nominal plaintiffs Kenneth P. Nolan and Vernon T. Judkins were appointed representatives of the 255 foreign claimants in these actions. Messrs. Nolan and Judkins had no contact with the claimants they represented and, as Petitioners have admitted, were retained by claimants' U.S. counsel to lend their names to these actions for the sole purpose of defeating diversity jurisdiction.[3]

The appointment of Nolan and Judkins to their various representative capacities was a necessary but not sufficient

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2 As Boeing advised the District Court, Petitioners' argument was and is without merit. Boeing pointed out that the FSIA provides for nationwide personal jurisdiction over a non-immune "foreign state." *See* 28 U.S.C. § 1330(b) (1988); *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 313 (2d Cir. 1982), *cert. denied*, 454 U.S. 1148 (1982).

3 Judkins is a citizen of Washington, and Nolan is a citizen of New York. Boeing is a Delaware corporation with its principal place of business in the State of Washington, and GE is incorporated and has its principal place of business in New York. Accordingly, should Nolan's and Judkins' citizenship control, complete diversity between plaintiffs and defendants would be absent.

element of Petitioners' strategy. As soon as the appointments were made (and in some cases even before), Petitioners filed these actions in Louisiana state court and served the complaints on defendants so that defendants' statutory 30-day removal period would expire prior to May 18, 1989, the effective date of § 202(a) of the Judicial Improvements and Access to Justice Act, Pub. L. 100-702, 102 Stat. 4642, 4646 (1988). This statute, which applied to actions removed on or after May 18, 1989, amended 28 U.S.C. § 1332(c) to clarify that the citizenship of a represented party, not the citizenship of his or her representative, determines whether diversity exists. Under this new law, there would unquestionably be federal diversity jurisdiction over Petitioners' claims against Boeing, GE, and CFMI, Inc. The prior law was unclear, however, because this Court had held 50 years ago that in some cases the citizenship of the representative, rather than the represented party, controls. *See Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183 (1931).

Defendants timely removed these actions on May 11, 1989, which was of necessity prior to the effective date of § 202(a) of the new Act, on the basis that the citizenships of Nolan and Judkins were not controlling. Respondents argued that, even before this section became effective, the *Mecom* decision was inapplicable to this situation in view of this Court's later decision in *Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823 (1969). The District Court disagreed, however, and held that in actions removed prior to May 18, 1989, the citizenship of nominal parties controls. Consequently, the District Court remanded the actions. The District Court also held that § 202(a) did not trigger a new 30-day removal period. Thus, the posture of the case after remand was that complete diversity existed between plaintiffs and defendants but the case could not be removed by defendants because the law accomplishing that result became effective after the period to remove had expired.

After the remand, Boeing moved in each action to add SNECMA as a third-party defendant.[4] These motions were granted without opposition, and SNECMA was served on August 10, 1989.[5] On August 17, 1989, SNECMA removed each of the sixteen civil actions to federal court. In its removal notices SNECMA stated that, as a French corporation almost entirely owned by the French government, it qualified as a "foreign state" under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.* (1988). The FSIA authorizes a foreign state to remove to federal court "any civil action" brought against it in state court. 28 U.S.C. § 1441(d) (1988).

Petitioners' motion to have their claims against Boeing, GE, and CFMI, Inc. remanded to state court was denied on September 23, 1989. The District Court held that, because

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4 Boeing's third-party complaint set forth a prototypical claim by a defendant in a product liability case for contribution or common law indemnity against a component supplier whose product was alleged *by plaintiffs* to have caused the accident. Boeing alleged SNECMA's role in the design and manufacture of the engines, pointed out that "plaintiffs allege that the crash resulted from the failure of one of the aircraft's CFM-56-3C-1 engines," and asserted that "[t]o the extent plaintiffs' damages, if any, were proximately caused by a failure of one of the accident aircraft's engines," Boeing was entitled to indemnity or, at the least, contribution.

Notwithstanding these facts, Petitioners profess confusion about the basis for Boeing's claim (Pet. 6 n.1, 13) and argue that Boeing's third-party complaint "had little, if any, connection to the main action." (Pet. 6)

5 On August 15, 1989, Petitioners, without giving notice to Respondents, moved *ex parte* to "sever" the third-party claims pursuant to Article 1038 of the Louisiana Code of Civil Procedure, which provides for the separate trial of claims for the purpose of avoiding delay or for the convenience of the parties or the court. Although the state court judge signed Petitioners' *ex parte* order, each of the main and third-party claims continued to be combined in one suit under one cause number and continued to constitute a single "civil action." The District Court found that the state court's *ex parte* separate trials order was irrelevant to the removal issue (App. 32), and the Court of Appeals agreed. (App. 18-19) Those rulings are not challenged in this Petition.

SNECMA had properly removed the entirety of these civil actions, no portion of them should be remanded. Boeing then moved to dismiss these actions under the doctrine of *forum non conveniens*. On October 18, 1989, the District Court granted Boeing's motion to dismiss, subject to certain conditions. *Nolan v. Boeing Co.*, 22 Avi. Cas. (CCH) 17,811 (E.D. La. 1989).

Petitioners appealed the order denying remand and the order of dismissal to the United States Court of Appeals for the Fifth Circuit, which affirmed.

REASONS FOR DENYING THE WRIT

I. The decision of the Court of Appeals in this case does not conflict with any decision of another United States Court of Appeals.

Petitioners' lead argument, contained in Point I of their Petition, is completely misleading. Contrary to Petitioners' assertion, there is no conflict between the Fifth Circuit's decision in this case and a "similar decision of the Seventh Circuit . . . ." (Pet. 5) In fact, neither the Seventh Circuit decision nor any other case cited by Petitioners in Point I even addressed the issues decided in this case. Therefore, Petitioners' suggestion that the cases are "hopelessly divided" (Pet. 5) and their argument that this Court should accept review to resolve "confusion" (Pet. 7) among the Circuits regarding the ability of a third-party defendant to remove a civil action are without merit.

Petitioners' argument misconceives the issues involved in this case and relies on wholly inapplicable cases. The cases cited by Petitioners discuss only whether: (1) a third-party defendant qualifies as a "defendant" under 28 U.S.C. § 1441(a); or (2) a third-party claim can be "separate and independent" from plaintiffs' claims against the original defendants and thereby form the basis for removal of the entire civil action pursuant to 28 U.S.C. § 1441(c). Even if there is some disagreement about these issues among courts,

these issues are not present in this case, which in no way involves either of subsections 1441(a) or 1441(c).

In this case, the Fifth Circuit addressed the scope of removal under the FSIA, 28 U.S.C. § 1441(d). The Fifth Circuit held that "when a third party [foreign state] defendant avails itself of removal jurisdiction under section 1441(d), at least where minimal diversity exists between the parties to the main claims, it removes not just the third party claims but the main claims as well".[6] (App. 17-18) No Court of Appeals, other than the Fifth Circuit in this case, has addressed the application of 28 U.S.C. § 1441(d) to a third-party defendant. However, numerous analogous statutes, *e.g.*, 28 U.S.C. § 1442(a) (1988), 28 U.S.C. § 2679(c) (1988), and 12 U.S.C. § 1819 (1988), allow a party to remove a "civil action" against that party on the basis of the party's identity or status. Court of Appeals decisions interpreting these sections have uniformly held that a third-party defendant can remove under these statutes and in doing so remove the entire civil action, not merely the third-party claims. These decisions are from the Courts of Appeals for the First, Second, Third, Fifth, Eighth, and Tenth Circuits. *See, e.g.*, *Thompson v. Wheeler*, 898 F.2d 406, 409 (3d Cir. 1990) (applying 28 U.S.C. § 2679(c)); *Urbanizadora Villalba, Inc. v. Banco Y Angecia de Financiamiento de la Vivienda de Puerto Rico*, 845 F.2d 1 (1st Cir. 1988) (applying 12 U.S.C. § 1819); *Falls Riverway Realty v. City of Niagara Falls*, 732 F.2d 38 (2d Cir. 1984) (applying 28 U.S.C. § 1442(a)); *Johnson v. Showers*, 747 F.2d 1228, 1229 (8th Cir. 1984) (applying 28 U.S.C. § 1442(a)); *Goodrich v. Burlington Northern*

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6 In addition to finding that minimal diversity existed between the parties to the main claims, the Fifth Circuit also stated that, at the time SNECMA removed the case to the District Court, "there was actually *complete* diversity between the plaintiffs and defendants pursuant to 28 U.S.C. § 1332(c)." (App. 10) (Emphasis in original.) Petitioners nevertheless state in their Petition that "there is no independent federal jurisdiction over the main action" (Pet. 5) and that "the Fifth Circuit seems to have overlooked" that the "suit between original parties . . . has no independent basis for federal jurisdiction." (Pet. 16)

R.R. Co., 701 F.2d 129, 130 (10th Cir. 1983) (applying 28 U.S.C. § 1442(a)); *IMFC Professional Services of Florida, Inc. v. Latin American Home Health, Inc.*, 676 F.2d 152 (5th Cir. 1982) (applying 28 U.S.C. § 1442(a)). The decision below is in accord with the unanimous rule of these cases.

Further, the holdings in this case and the other cited cases that a third-party defendant's removal removes the entire case honor the longstanding Congressional preference that the entire civil action is removed and not just the claims against the removing party.[7] *See Barney v. Latham*, 103 U.S. 205, 209 (1881); *Texas Employers Ins. Ass'n v. Felt*, 150 F.2d 227, 234-35 (5th Cir. 1945). The instant case does not present an appropriate occasion to reconsider this well-established doctrine.

As for Petitioners' claim that the Fifth Circuit's decision in this case conflicts with a "similar decision of the Seventh Circuit", the only decision of the Seventh Circuit (or any other Circuit) even cited by Petitioners in Point I is *Thomas v. Shelton*, 740 F.2d 478 (7th Cir. 1984), which appears in a footnote (Pet. 7 n.3) and is not otherwise discussed. In *Shelton*, the Seventh Circuit addressed the issue of removal by a third-party defendant under 28 U.S.C. § 1441(c). 740 F.2d at 482. The court was not faced with, and did not address, the scope of removal under 28 U.S.C. § 1441(d).[8]

Petitioners' use of cases decided under § 1441(c) to suggest that the Fifth Circuit incorrectly interpreted § 1441(d) is not only misleading but is also illogical. These statutes have different language and different purposes; further, they have markedly different policies. The purpose of § 1441(c) was explained by the Seventh Circuit in *Shelton*:

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7 The only present exception to this rule concerns bankruptcy removals under 28 U.S.C. § 1452 (1988), which allows a party to remove "any claim or cause of action in a civil action." *See In re Princess Louise Corp.*, 77 B.R. 766, 769 (C.D. Cal. 1987).

8 It is perhaps telling that this so-called "similar" case was never even cited by Petitioners to either the District Court or the Court of Appeals.

> The apparent purpose of this provision and its predecessor, 28 U.S.C. § 71 (1940 ed.), was to prevent a plaintiff who sues a defendant in state court on a claim within the federal court's original jurisdiction from attempting to defeat the defendant's right of removal by joining a claim not within that jurisdiction.

740 F.2d at 482. Moreover, as is the case with removal under 28 U.S.C. § 1441(a) and § 1441(b), federal courts have narrowly construed this particular removal provision in order to demonstrate "due regard for the rightful independence of state governments." *Shamrock Oil Corp. v. Sheets*, 313 U.S. 100, 108-109 (1941).

On the other hand, § 1441(d) was enacted as part of the FSIA, and its purpose is to concentrate litigation involving foreign states in the federal courts in order to achieve uniform standards of decisional law. As this Court stated in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 497 (1983), § 1441(d) was enacted because "Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts . . . ."

In the case of § 1441(d), Congress created a distinct preference for removal by foreign states as compared to the right of other parties to remove under provisions like §§ 1441(a)-(c). As a result, federal courts have generally declined to apply to § 1441(d) the proposition that removal statutes should be strictly construed. *See, e.g., Proyecfin de Venezuela, S.A. v. Banco Industrial de Venezuela*, 760 F.2d 390, 396-397 (2d Cir. 1985) ("Congress's intent to create a broad removal right is further substantiated by reference to the legislative history of the [Foreign Sovereign Immunities] Act").

In summary, there is no conflict between this case and any decision of any other Circuit. Petitioners ultimately admit this fact in the first sentence of their Point II: "[N]one of the cases cited in Point I deal with the precise issue presented here . . . ." (Pet. 8)

II. There are no other special or important reasons for reviewing the judgment below.

In Points II and III of the Petition, Petitioners attempt in various ways to persuade the Court that there are significant issues here that warrant review. All of these arguments are without merit.

A. Petitioners' collusion argument is without merit.

Petitioners claim that Boeing's assertion of third-party claims against SNECMA was a "collusive ploy" (Pet. 14) to create jurisdiction in this matter. The Fifth Circuit correctly determined that this argument was "frivolous." (App. 20) This Court decided long ago that the assertion of a good-faith claim by a party with a real and substantial interest in that claim cannot be "collusive" for purposes of 28 U.S.C. § 1359 and its predecessor statutes. *In re Metropolitan Ry. Receivership*, 208 U.S. 90, 111 (1908); *Chicago v. Mills*, 204 U.S. 321, 330 (1907) (holding that a party's motive for preferring a federal tribunal is immaterial).[9]

Petitioners assert that SNECMA's waiver of jurisdictional immunity somehow indicates collusion between itself and Boeing regarding the removal of the action. (Pet. 6) SNECMA's waiver of immunity was not only irrelevant to the decisions below,[10] but Petitioners' arguments ignore the fact that SNECMA had good reason to waive any jurisdictional immunity it might have in this case. SNECMA determined that,

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9 Cases decided under the predecessors of 28 U.S.C. § 1359 have continuing validity in interpreting that section. *Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823, 826 (1969).

10 SNECMA's waiver was filed the same day the District Court dismissed the actions and neither the District Court nor the Court of Appeals even referred to the waiver. Furthermore, the District Court's opinion cited a Fifth Circuit Case holding that if a case can be dismissed on *forum non conveniens* grounds the immunity issue need not be decided. *Nolan v. Boeing Co.*, 22 Avi. Cas. (CCH) 17,811, 17,812 n.1 (E.D. La. 1989), citing *Forsythe v. Saudi Arabian Airlines Corp.*, 885 F.2d 285 (5th Cir. 1989).

after carefully considering its alleged commercial activity in the United States and the time, effort, and expense that would result if it were to maintain its immunity defense, and after considering the likelihood of an early dismissal of this case in its entirety on the ground of *forum non conveniens*, it was in SNECMA's best interest to waive (in this case only) its immunity under the FSIA pursuant to 28 U.S.C. § 1605(a)(1) (1988). In so doing, SNECMA reserved to itself all other entitlements, rights, and privileges granted by the FSIA. In addition, SNECMA determined that, although it is in its interest to have this case litigated in the United Kingdom, it is also in its interest to have this case litigated in a federal forum if it is to be litigated in the United States. As the Court of Appeals correctly observed, "[t]he outcome of the main suit very much affects SNECMA's rights." (App. 15) In summary, Petitioners are not in a credible position to assess the interests of SNECMA in this case.

Petitioners' "collusion" claim was carefully considered and rejected by both lower courts. In any event, Petitioners' arguments present no issue of general significance that this Court should address.

B. Petitioners' *Finley* argument is without merit.

Petitioners argue in Point II of the Petition that the Court of Appeals' decision "directly conflicts" with this Court's recent decision in *Finley v. United States*, 490 U.S. 545 (1989), which held that a different statute, the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b) (1988), does not authorize supplemental jurisdiction over non-federal claims. (Pet. 10) This argument is legally incorrect and, in view of the substantial statutory changes made since *Finley*, does not present a significant issue for the Court.

First, as the Fifth Circuit carefully explained in its opinion, there is no conflict between its decision and *Finley*. Unlike the situation in *Finley*, when Congress enacted the FSIA it expressly provided in § 1441(d) for federal jurisdiction over the entire "civil action" in cases involving foreign states,

which necessarily includes claims involving other parties. *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404 (9th Cir. 1990); *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980).

Second, notwithstanding Petitioners' frequently repeated contention that their claims are not within the District Court's original diversity jurisdiction, these cases were properly removed by SNECMA after the effective date of the legislation clarifying that the citizenship of the represented parties should be considered in determining if diversity exists. *See* 28 U.S.C. § 1332(c)(2) (as amended by Pub. L. 100-202, § 202(a), 102 Stat. 4642, 4646 (1988)). As a result, the Fifth Circuit held that Petitioners' claims against Boeing, GE, and CFMI, Inc. were within the District Court's original jurisdiction at the time of SNECMA's removal. (App. 10) The fact that the defendants were unsuccessful initially in removing these claims prior to the effective date of the amendment to § 1332(c) is irrelevant. Further, the statutory change gives this case a unique factual and procedural posture. The improbability of such a situation arising again is reason enough for this Court to deny the Petition.[11]

Third, and perhaps most importantly, *Finley* itself has been legislatively overruled, and future cases will necessarily present very different issues from this case. Section 310 of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5113-14 (codified as 28 U.S.C. § 1367), expressly provides for the sort of supplemental jurisdiction in

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11 Because of the quirk that the main claims were within the original jurisdiction of the federal court even though they could not be removed, they would have remained in federal court even if SNECMA had been dismissed. *See, e.g., In re Wilson Industries, Inc.*, 886 F.2d 93, 96 (5th Cir. 1989). Typically this will not be the case, and pendent state law claims will be subject to remand if the federal claims are dismissed. *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988). *See* U.S.C. § 1367(c)(3) (as amended by Pub. L. 101-650, § 310, 104 Stat. 5089, 5113-14). This fact disposes of Petitioners' claim that, if the Fifth Circuit's decision is permitted to stand, foreign state defendants will be impleaded on the merest "pretense" (Pet. 8, 9) which "will result in an avalanche of parties seeking removal . . . ." (Pet. 8)

the federal courts that this Court found not to exist in *Finley* and which Petitioners contend does not exist under the FSIA. The new § 1367(a) provides, in relevant part:

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

This new statute was Congress's response to this Court's comment in *Finley* that "[w]hatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress", 490 U.S. at 556, and eliminates for future cases the so-called conflict that the Petitioners allege exists in this action. As stated in the legislative history to this new statute, "[i]n providing for supplemental jurisdiction over claims involving the addition of parties, subsection (a) explicitly fills the statutory gap noted in *Finley v. United States*." H.R. Rep. No. 101-734, 101st Cong. 2d Sess. 29, *reprinted in* 1990 U.S. Code Cong. & Admin. News 6802, 6875. The statutory change after this case arose refutes Petitioners' claim that the Fifth Circuit's ruling has some broad applicability to future cases.

Petitioners nevertheless try to give a semblance of public significance to this case by arguing that the law under which it was decided is unaffected by § 1367. Their argument seems to be that § 1367 does not apply to FSIA jurisdiction and that a Congressional intent to narrow FSIA jurisdiction should be read into the fact that § 1441(d) was not itself amended. While questions as to the relationship of the 1990 legislation to the FSIA are obviously for another day, Petitioners' argument that § 1367 is irrelevant can be easily dismissed.

Petitioners state that § 1367 permits supplemental (also called "pendent party") jurisdiction "only in a case where a well-pled federal question is the primary basis of federal jurisdiction", apparently attempting to distinguish such cases from FSIA cases for which, they say, "pendent party jurisdiction of the federal court is not allowed." (Pet. 12) In fact, by its plain language, § 1367 applies to "any civil action of which the district courts have original jurisdiction." Under 28 U.S.C. § 1330(a), the district courts have "original jurisdiction of any nonjury civil action against a foreign state." FSIA cases are squarely within the class of cases to which the new legislation applies.

C. Petitioners' argument concerning the purpose of the FSIA is without merit.

In a further attempt to attract this Court's attention to this case, Petitioners have raised an issue that was not raised in the Fifth Circuit. Petitioners argue that "the sole purpose" for allowing a foreign state to remove under 28 U.S.C. § 1441(d) is to provide a federal forum for the adjudication of sovereign immunity. (Pet. 9-10, 13) This argument is without supporting authority and is frivolous. When Congress enacted the FSIA, it intended that *all* issues in cases involving a foreign state could be brought before a federal district court, not just the issue of sovereign immunity. This conclusion follows from the plain language of the statute. It is made more clear by the legislative history and is confirmed again by the case law. As this Court stated in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. at 489, "the Act guarantees foreign states the right to remove *any* civil action from a state court to a federal court." (Emphasis supplied.)

The legislative history to the FSIA specifically states that "broad jurisdiction in the Federal courts should be conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences" and that "[i]n view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in

this area, it is important to give foreign states clear authority to remove to a Federal forum actions brought against them in the State courts." H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 13, 32, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6611, 6631. An even clearer statement of the legislative purpose is contained in the report of the American Bar Association Section of International Law to the House of Delegates recommending passage of the FSIA:

> The bill will ensure that the federal courts have subject matter and personal jurisdiction over foreign states that are not entitled to immunity for claims against them by American citizens. . . . [F]rom the perspective of the foreign states, the removal provision in the bill will allow them to seek in the federal courts what they may regard as greater impartiality and uniformity of decision.

1976 A.B.A. Int'l L. Rep. 101B at 10. *See Arango v. Guzman Travel Advisors Corp.*, 621 F.2d at 1376-77 n.6 ("the federal hearing is not restricted to [the sovereign immunity] issue but must proceed to the merits when the foreign state is found not to be immune.")[12] Petitioner's accusations that "SNECMA clearly did not invoke the federal court jurisdiction in good faith since it waived its claim of immunity immediately after removal" (Pet. 4) and that SNECMA "did not honestly seek the federal court for the determination of its immunity" (Pet. 6) misconceive the scope of SNECMA's right under the FSIA to litigate all issues in federal court.

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12 A survey of the case law illustrates that foreign states often remove without even making a claim of immunity. For example, a foreign state which has engaged in commercial activity in the United States may remove a civil action originally commenced in state court simply to extinguish a plaintiff's demand for a jury trial. *See, e.g., Williams v. Shipping Corp. of India*, 653 F.2d 875 (4th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982); *Mori v. Port Auth. of New York and New Jersey*, 100 F.R.D. 810 (S.D.N.Y. 1984); *Herman v. El Al Israel Airlines, Ltd.*, 502 F.Supp. 277 (S.D.N.Y. 1980).

D. Petitioners' "comity" and "federalism" arguments are without merit.

There are no significant comity and federalism issues present in this case that warrant this Court's attention. SNECMA's removal of these actions pursuant to the FSIA rests upon strong federal interests, namely relations with foreign governments. Moreover, because this case has no connection whatsoever with Louisiana, there are no significant state interests which might take precedence over these federal interests.

This case arises out of an aircraft accident that occurred on a domestic flight in a foreign country. The claimants are virtually all citizens or residents of the United Kingdom; none of them are residents of Louisiana or even of the United States. Furthermore, none of the Respondents are incorporated in, or have their principal place of business in, Louisiana, and none of Petitioners' claims against Respondents arise out of any acts or omissions that occurred in or had any impact in Louisiana. There is simply no plausible, much less compelling, policy of comity or federalism that dictates that a Louisiana state court should decide this case.

CONCLUSION

The decision of the Fifth Circuit is not in conflict with any decision of this Court or of any other Court of Appeals. Furthermore, the decision of the Fifth Circuit does not raise any important issues regarding the Foreign Sovereign Immunities Act of 1976, this Court's *Finley* decision, the existence of supplemental jurisdiction, or the relationship between the state and federal courts. Finally, the Fifth Circuit correctly decided the scope of removal under 28 U.S.C. § 1441(d) and correctly concluded that each removed civil action was within its jurisdiction. Therefore, the Petition for a Writ of Certiorari should be, in all respects, denied.

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